

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-196

March 11, 2003

KENNEBUNK LIGHT & POWER DISTRICT
Petition for Approval to Furnish and Extend
Retail Electric Service in the Entire Town
of Kennebunk

ORDER ON PETITION FOR
CLARIFICATION AND
RECONSIDERATION

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

Through this Order, we clarify certain aspects of our Order Denying Petition (issued in this proceeding on October 4, 2002), but do not change any substantive decisions made in this proceeding.

II. BACKGROUND

On April 8, 2002, the Kennebunk Light & Power District (KLPD or District) filed a petition, pursuant to 35-A M.R.S.A. § 2110, for a Commission declaration that the public convenience and necessity require KLPD to be authorized to furnish electric service throughout the entire Town of Kennebunk. By filing the petition, KLPD sought authorization to extend its service into the southeastern area of the Town, which is currently served by Central Maine Power Company (CMP).

On October 4, 2002, the Commission denied the District's petition. *Order Denying Petition*, Docket No. 2002-196 (Oct. 4, 2002). The Commission concluded, based on the District's arguments in its petition and briefs, that it could not make a case that would support the granting of authority to serve portions of the Town that are presently served by CMP. Specifically, the Commission decided that there were no circumstances or facts stated in KLPD's petition that would permit the requisite finding of "public need" under current law.

On October 24, 2002, KLPD filed a Petition for Clarification, and Alternative Petition for Reconsideration regarding the Order Denying Petition. KLPD asks the Commission to clarify several aspects of the Order and asks for reconsideration to the extent that such clarifications would lead the Commission to a different outcome. CMP, Maine Public Service Company, and Eastern Maine Electric Cooperative filed responses to the KLPD petition supporting the Commission's initial decision in the proceeding.

III. DISCUSSION

In its petition, KLPD asks for clarification or reconsideration in several areas. We discuss each of these below, as well as other matters raised in the KLPD petition.

A. Consistency with Natural Gas Cases

1. Public Need Test

KLPD states that the Commission appears to have adopted a formulation of the Law Court's "public need" test (articulated in *Standish Telephone Co. v. Public Utilities Comm'n*, 499 A.2d 458, 459 (Me. 1985)) in this case that is significantly different from that applied in the context of natural gas "second utility" proceedings. KLPD's claim of inconsistency is based on language in the Commission's Order in *CMP Natural Gas, LLC*, Docket No. 99-477 at 15-16 (Dec. 13, 1999) stating that *Standish Telephone* establishes that public need may be satisfied if "the type of service offered by the second utility is of a different type, price, or quality from that offered by the incumbent." KLPD states that, in reliance on this formulation of the standard in the disjunctive, it sought to prove significant qualitative and cost differences between its service and that of CMP, but the Commission ignored such offers of proof.

In our Order Denying Petition, we concluded that the District could not make a case that would satisfy the *Standish Telephone* "public need" test because the service proposed by the District was not a different service than that offered by CMP. We explained that *Standish Telephone* requires us to find that either CMP's current service is inadequate or that the KLPD's proposed service is not currently provided. *Id* at 10-11; *See Standish Telephone* at 461-462. After noting that the District stated that it is not arguing that CMP service is inadequate (or that its rates are unjust and unreasonable), we concluded that nothing differentiates the actual service the District proposes to provide from CMP's service that would justify a finding that the proposed service is a different service for purposes of the public need test. *Id.* at 11.

The holding of *Standish Telephone* is clear; the proposed service by a second utility must be of a type that is not presently offered. We acknowledge that the statement in *CMP Natural Gas* quoted by the District mischaracterized *Standish Telephone* to the extent it suggests that the proposed service does not have to be of a different type of service and that either lower price or higher quality alone would be enough to authorize a second utility. Notwithstanding this mischaracterization, the actual holding in *CMP Natural Gas* was that the proposed service to a newly constructed electric generation facility was a different type of service than that provided by the existing utility. *CMP Natural Gas* at 16.¹ Moreover, in the same decision, the

¹ We explained that that the proposed service for the electric generation facility was a high volume/high pressure service which the current utility did not provide, and that the existing utility would have to add the same type of infrastructure to provide service as the second utility.

Commission declined to provide CMP Natural Gas the authority to serve a town that was already receiving service because a need for a second utility to serve customers of the existing utility had not been demonstrated. *Id.* at 18, 22. Thus, the statement in *CMP Natural Gas* quoted by the District is dictum that is inconsistent with the actual holding in the case and with the public need test as enunciated in *Standish Telephone*. Any substantial reliance on the statement would have therefore been misplaced.²

We did not address issues of KLPD's quality of service and cost in our Order Denying Petition because the threshold issue before the Commission was whether the electric distribution service proposed to be provided by the District is a different service from that provided by CMP.³ Once we had rejected this argument and concluded that we could not find public need, there was no need to address KLPD's service quality or costs.

Finally, we note that we did not go to great lengths to distinguish the Commission's natural gas cases, because the District's claim of public need was based on the unique nature of its municipal utility service. We respond to the District's request for clarification regarding the gas cases by observing that there is an obvious and critical factual distinction. In the natural gas cases, the Commission authorized second utility service where the currently authorized utility was not providing service. In contrast, the current case involves a request for second utility authority in an area that is already served by an existing utility.⁴

2. Competition Policy

KLPD states that the Commission evaluated franchise competition in retail natural gas distribution, and had concluded that economic efficiencies and the public interest in safe and adequate service and orderly infrastructure development

² KLPD's statements in its original petition in this proceeding contradict the notion that it relied in any substantial way on the quoted statement in *CMP Natural Gas*. KLPD explicitly stated that its situation is unique, that its research shows that there have been no analogous efforts to invoke second utility authority, and that there is little precedent to guide the Commission. KLPD Petition at 5-6.

³ From the outset, KLPD stated that it was not relying on the alternative route to showing public need under *Standish Telephone* -- that the existing service (CMP's) was inadequate.

⁴ On two occasions in its petition for clarification, the District expressed concern that the Commission's treatment of the natural gas cases when compared to the current case creates an impression that we apply different rules when CMP is the incumbent utility or when CMP's affiliate is the second utility. We trust that the clear distinction among the cases stated above addresses the District's "concern" of some type of institutional preference or favoritism for CMP and its affiliates.

would be served by allowing multiple gas utilities to compete to serve an area. See *Central Maine Power Co.*, Docket No. 96-786 (Aug. 17, 1998); *Mid-Maine Gas Utilities, Inc.*, Docket No. 96-465 (Mar. 7, 1997). KLPD asks the Commission to clarify why it did not address in any detail its policy arguments that the reasoning in the natural gas distribution franchise cases should apply with comparable force in the context of electric distribution franchises.

KLPD's original petition did cite to some literature that would apparently support efficiency arguments for electric distribution competition. We did not address in any detail issues regarding the propriety of electric distribution competition⁵ because the threshold matter before the Commission was whether the District's assertions regarding the nature of its service could, even if proven, ever establish that it provides a different service than that of CMP and thus satisfy the public need test. Once we determined that the District could not meet the public need test, there was no need for a detailed analysis of whether electric distribution competition would be desirable (or any other issue that the District did or could have raised in its original petition).

However, we will respond to the District's request for clarification regarding the difference between our promotion of competition in the context of the natural gas cases and the circumstances of the current case. Our decisions in the natural gas cases stand for the proposition that competition among natural gas suppliers should be authorized to promote the *expansion* of infrastructure and service to customers for whom service has not been available. We have never authorized a second gas distribution utility to compete for customers that are already receiving service, which is the analogous situation to that presented in the current proceeding.⁶

KLPD's argument on reconsideration seems to be that we are obligated in this case to reconsider the policy of granting electric distribution companies a monopoly position within their service territories. However, there is nothing in *Standish Telephone* that would permit such an examination. On the contrary, we would violate *Standish Telephone* if we were to base a finding of public need on the theory that, even though the proposed service is the same as that of the incumbent utility, second utility service should be authorized because the current regulatory paradigm is

⁵ We did state in our Order Denying Petition that there is no reason to believe that electric distribution service is not still a natural monopoly and that there is no national or state policy favoring the promotion of competition for electric distribution service.

⁶ Situations in which the existing utility is actually providing service raise additional issues that are not present when no actual service exists. These include potential harm to the ratepayers of the existing utility and the potential for inefficient duplication of facilities.

simply wrong.⁷ If KLPD wishes to make the argument that electric distribution, like electric generation, should become a competitive service, such arguments should be addressed to the Legislature.

B. District's Service Quality

KLPD asks the Commission to explain whether it considered the District's offer to show that there were significant differences in its quality of service relative to CMP. Because of our decision on the threshold issue, there was no need to address the District's service quality.

As discussed above, the threshold issue presented to us was whether KLPD could satisfy the public need test by demonstrating that it was proposing to offer a different service from that of CMP. Under *Standish Telephone*, the relevance of quality of service arguments would be to demonstrate that the existing utility service was inadequate. In this case, KLPD acknowledged that CMP service was not inadequate for purposes of the *Standish Telephone* public need test. Thus, the Commission did not need to analyze or assess quality of service arguments because it in effect concluded that the District could not meet the public need test even if it could show higher quality or greater responsiveness. A showing that the District could provide basic electric distribution service of a higher quality is not relevant under *Standish Telephone* to establish public need when the proposed service is not different from the service already provided.

C. Relevance of Lower Price

In our Order Denying Petition, we explicitly rejected "any suggestion" that lower price alone makes a service different for the purpose of satisfying public need. KLPD asks that we clarify that KLPD itself never made the argument that price alone would be sufficient to satisfy the public need test.

Our Order Denying Petition did not attribute this argument to the District or to any other party. We therefore accommodate the District's request and hereby clarify that it did not make this argument. The District, however, did state in its brief that it has the capability to provide service at a lower cost and of a higher quality than that of CMP.

⁷ It is worth noting that there may be arguments that natural gas and electric distribution should be treated differently based on the theory that other fuels can be more easily substituted for natural gas, meaning that gas utilities are already subject to competition. The current proceeding, however, is clearly not the vehicle to address such issues.

In response to such statements by the District, it was not unreasonable for us to reject “any suggestion” that price alone might be enough.⁸

D. Legislative Representations

In its petition for clarification, KLPD states that it “appreciates” that the Commission has put to an early end the “enforced pursuit of relief that the Commission now makes plain it never had any intention of granting.” The suggestion is that the Commission formed this “non-intent” back when the matter was being debated before the Legislature and that the Commission intentionally persuaded the Legislature to allow the Commission to resolve the matter under current law knowing all along it would never grant KLPD’s request. The District’s comments in this regard require a response.

First, contrary to the District’s comments, the Commission never objected to the Legislature’s bypassing Commission approval, but strongly advised the Legislature to consider those issues that would be examined in a Commission proceeding (e.g., stranded cost compensation, greater efficiencies).⁹ Thus, any suggestion that the Commission opposed the District’s legislation because of a view that the Commission rather than the Legislature should decide the matter is not accurate.

Second, there was no focus during the legislative debates as to whether the District’s theory of local self-determination could satisfy the public need test under current law. At the time this matter was before the Legislature, the Commission could not have known that the District would rely exclusively on a novel self-determination theory, which had not been recognized under current law. The issue of whether local self-determination could satisfy the public need test under current law was first raised by CMP in response to the District’s petition initiating this proceeding. Once the issue was raised, all parties (including the District) requested that the Commission address the issue as a threshold matter so that resources would not be wasted. This is exactly what occurred.

Third, in contrast to the comments in its petition for clarification, the District’s original petition acknowledged that the Commission has limited authority and may not be able to grant its request based on the local self-determination argument. Accepting this possibility, the District asked that the Commission make its determination as soon as possible. The District stated on pages 6-7 of its original petition:

⁸ Interestingly, the District argues on reconsideration that it acted in reliance on a Commission statement in *CMP Natural Gas* that suggested that either higher quality or lower price alone could satisfy the public need test. See, section III(A), above.

⁹ As an alternate approach, we suggested that the Legislature could direct the Commission to determine the amount for which CMP should be compensated for its distribution assets.

In light of the limited nature of the delegation of the Legislature's authority over utility regulation to the Commission, KLPD requests that the Commission make specific findings at the earliest possible point under § 2110 concerning KLPD's demonstration of public need based on the local self-determination issue at the heart of this case.

Moreover, on pages 8 and 12 of its original petition, the District again acknowledged the understanding that the Legislature decided that the Commission should consider the matter under current law to determine if the requested relief should be granted before the matter came back to the Legislature. Thus, considering the statements made in its original petition, it is difficult to understand the District's apparent dismay over how the matter played out before the Commission.

Finally, we note that statements in the District's petition for clarification regarding our prior intent regarding this proceeding, as well as suggestions of favoritism towards CMP (mentioned above), are difficult to read as anything other than an accusation of bad faith on the part of the Commission. We cannot fathom, however, why the Commission would act in bad faith to deceive or mislead the Legislature or the District regarding this matter, or why it would act to favor one utility over another. Certainly, the District has provided no factual basis for any such accusation. In the case of the District's long-standing efforts to serve the entire Town of Kennebunk, we have assumed that the District has acted in good faith to fulfill its view of its responsibilities. We see no reason why the District, while it may disagree with us on the merits, would not hold the same view of the Commission.

IV. CONCLUSION

As discussed above, we clarify various aspects of our Order Denying Petition, but decline to reconsider our substantive decision in this proceeding.

Dated at Augusta, Maine, this 11th day of March, 2003.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.